

ORIGINAL

RECEIVED

February 24, 1999

FEB 24 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: MCI WorldCom Petition for Reconsideration (CC Docket No. 98-79)

This week, the Commission is required to rule on several outstanding petitions for reconsideration of various aspects of its ADSL Tariff Order.¹ GTE proposed to bundle ADSL technology on local loops with its interoffice transport and ATM packet switches to deliver high-speed data communications between two end users. GTE argued, and the Commission apparently agreed, that the primary use of this service will be to provide high-speed data connections between end users and their Internet Service providers ("ISPs"). While MCI WorldCom does not dispute that Internet access will be one common use of ADSL service, there are numerous other applications (such as work at home or remote access to corporate intranets) that also will use this service. The Commission's order appeared to ignore these other applications, and instead declared that GTE's ADSL service is interstate in all cases because "the communications at issue here do not terminate at the ISP's local server ... but continue to the ... distant website accessed by the end users."² MCI WorldCom objects strenuously to the conclusion that any ADSL service -- or, using the same "logic," any telephone service -- used by an ISP automatically is deemed interstate in nature.

It is well established, and beyond any dispute, that enhanced services are not regulated basic common carriage services, but instead are unregulated end user services that are part of intrastate and interstate commerce. The Commission reached that conclusion in its Second Computer Inquiry decisions when it determined that it possessed Title I jurisdiction to preempt state regulation of enhanced services as telecommunications services, but did not itself have Title II jurisdiction to regulate enhanced services. The rule adopted by the Commission at that time, upheld by federal courts, and still in effect today declares that enhanced services

¹ In the Matter of GTE Telephone Operating Companies, GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket No. 98-79 (released October 30, 1998) ("ADSL Tariff Order").

² ADSL Tariff Order at ¶ 19.

are not subject to Title II regulation.³ The Telecommunications Act of 1996 codified the key elements of the Commission's earlier enhanced services decisions by adopting a definition of information service that was more expansive than the earlier Commission definition of enhanced services,⁴ and declaring that a particular type of information service, the Internet, should remain unfettered and free from state or federal regulation.⁵ Thus, over fifteen years of law and policy agree: information services are not telecommunications services.

During that same period of time, information service providers have been treated as end users of telecommunications. Like other end users, ISPS have been able to obtain switched or dedicated telecommunications services (local, intrastate, or interstate) offered by any carrier. Some parties argue that the Commission merely permitted ISPs to procure end user services, rather than forcing them to procure access services or use only interstate services, as the Commission here proposes for the first time. But, while the Commission may pick and choose how it regulates certain classes of common carriers, and may even discriminate in a broad sense (for example, by forcing some carriers to gain access to their end user customers only by using grossly overpriced local carrier-provided access services), MCI WorldCom is unaware of any Commission authority to similarly regulate, let alone discriminate among or against, end users. In the ADSL Tariff Order, the Commission appears to have declared that ISPs may only procure interstate high-speed packet services merely because (1) they are engaged in interstate commerce and (2) they use telecommunications services intensively in their production of information services. For this decision not to be blatantly discriminatory against one class of end users -- ISPs -- the Commission would have no choice but to apply the same logic to all end users engaged in interstate commerce. Thus, no end user engaged in interstate commerce could procure intrastate telecommunications services. Such an unprecedented power grab would totally overwhelm the Commission's carefully-delineated statutory authority over common carriers.

Further, MCI WorldCom is aware of no Commission authority to determine the jurisdictional classification of services by linking two end users through a third, unrelated end user. Of course, this is precisely what the Commission does with regard to interstate access, but there the relationships are between three common carriers. The access relationship is, nonetheless, very instructive. The ILECs mock MCI WorldCom's position that end user calls to an ISP are separate and distinct from a subsequent call launched from the ISP's platform to a nearby or distant information source -- the so-called "two call theory." But the Commission's access regime is itself the single best example of the inherent logic of the two call theory. In access, an end user dials a distant party either by making a "1+" call or by dialing a carrier access code. The ILEC routes the call to the designated interexchange carrier and immediately treats that call as completed for all purposes, including billing. The originating carrier does not

³ 47 C.F.R. Section 64.702(a) (1998).

⁴ 47 U.S.C. Section 153(41).

⁵ 47 U.S.C. Section 230(b)(2).

know, and does not care, whether the call leaves the intermediate carrier on dedicated or switched terminating access, or never leaves that platform at all. In fact, the originating carrier may not even know where the call is going; it just provides a service for a fee. Among other things, that is one reason why originating and terminating access minutes differ.

The GTE ADSL tariff operates in almost exactly the same way. GTE provides a packet-switched connection between two end users – one of whom, the Commission assumes, always will be an ISP. But not only does GTE not know the identity of every ISP, GTE is completely ignorant whether every, or any, end user request for information from an ISP will require that ISP to launch a request to another ISP in a different state. Nonetheless, the Commission makes the heroic, and completely unfounded, assumption that most local calls terminating to an ISP will result in one or more subsequent calls to distant ISPs. Even if that assumption were correct, however, the Commission can only reach its jurisdictional conclusion by treating the ISP as a common carrier, which it most definitely is not. Setting aside the point that access is treated as two separate calls, the Commission has already reached that same conclusion when it completely ignoring existing information services such as HighwayMaster, where end users reached an enhanced service platform by dialing an access number.⁶ Once on the platform, the end user has the choice of accessing a number of information services, and/or of launching other telephone calls. Such a service is not regulated, and is not required to use only interstate telecommunications services.

This two-call scenario is also consistent with the Commission's Georgia MemoryCall Decision.⁷ There, the Commission concluded that there was one call from the end user to the ISP's platform, and that the jurisdiction of that single call is determined by the location of the end users -- in that case, the caller and the ISP. The Commission did not reach the question of how to treat a subsequent call launched from the platform, but the precedent is clear -- the jurisdiction of the call is determined by the locations of the caller and the ISP.

The Commission also justifies its decision in part on the assertion that more than 10 percent of the retrieved information will come from interstate sources. As indicated above, this guess on the Commission's part is irrelevant because ISP activities do not constitute common carriage, but the Commission's reasoning is flawed even if one follows the logic. First, the Commission established exactly the opposite point in the Georgia MemoryCall Decision, where it held that the jurisdiction of a call to retrieve voice mail messages is determined by the location

⁶ See also AT&T Comparably Efficient Interconnection Plan for Enhanced Services Complex, Memorandum Opinion and Order, 6 FCC Rcd 4839 (1991) (interactive voice service enables customers to make separate outbound calls to third parties without disconnection from Enhanced Service Complex).

⁷ Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992) ("Georgia MemoryCall Decision").

of the retrieving caller and the ISP, regardless of the originating point of the callers who left messages with the enhanced MemoryCall service. Thus, for example, an end user might write a letter to a distant information source and ask that source to send a message to the writer's voice or electronic mail box in the writer's local calling area. If the writer later were to retrieve the information by making a call to the voice mailbox, the call would be treated as a local call. Yet, when the end user requests the same information electronically, the retrieval becomes interstate. This teleology simply makes no sense.

The Commission also overlooks another important factual point in its ADSL Tariff Order. One of the significant benefits of packet switching is that it uses transmission facilities much more efficiently than circuit switching. This efficiency is accomplished by sending sequential packets independently across multiple facility paths, thus deliberately avoiding the use of a connection in the same sense that a switched circuit does. Further, the end links in the packet network operate at transmission speeds far lower than backbone speeds. For example, MCI WorldCom recently announced that it has introduced 2.5 gigabit-per-second data transmission speeds in its ISP backbone network. Even at the highest ADSL speeds that consumers will be able to use (between 1.5 and 7 kilobits per second, depending on technical factors), the backbone will transmit traffic almost 1000 times faster than the GTE service. The industry would lose one primary benefit of packet switching if it were necessary to slow the network down to the end link speed. Instead, ISPs buffer or "cache" information locally, and use their networks to serve other customers while data is downloading or while the end user is composing or reading text. It seems quite plausible that 100 percent of the information could be recovered from distant locations, yet information would be transiting interstate facilities a small fraction of 1 percent of the time. There simply is no justification for the Commission's unsupported assumption that interstate facilities will be in use at least 10 percent of the time.⁸

For all of the above reasons above, and for the reasons more fully developed in its other filings in this proceeding, MCI WorldCom respectfully requests that the Commission reconsider its decision in the ADSL Tariff Order. The Commission should acknowledge and

⁸ This view is certainly buttressed by the "Investigation of ISP Interstate Traffic for Selected Internet Applications," a report compiled by two college professors and provided in the reply comments of Hyperion Telecommunications in this proceeding. Hyperion indicates that it submitted the Internet traffic report in order to directly refute the repeated unsubstantiated claims by GTE, US West, and other ILECs that more than 10 percent of traffic over ILEC loops using ADSL service is interstate in nature. Reply Comments of Hyperion, January 19, 1999, at 2-4. In contrast, GTE's bloated and near-hysterical "Motion to Strike," filed just a week ago, has as its only objective to remove from the record the first and only piece of solid factual evidence provided by any party relevant to the salient question (after conceding for the sake of argument the Commission's legal views) of what percentage of ISP-bound traffic using ILEC loops can be viewed as interstate in nature. Needless to say, the word "irony" fails to fully convey the singular attitude of a party seeking to strike the same type of highly relevant record evidence that it itself has studiously refused to supply.

reinstate its longstanding policy, namely, that the jurisdiction of a service connecting end users to their ISPs is determined by the location of the ISP and the end users, not by some near or distant location from which the ISP may subsequently retrieve information. If the Commission nonetheless does not revisit its decision, MCI WorldCom asks that such a significant change to the treatment of ISPs be considered only in a notice-and-comment rulemaking proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. S. Whitt', written in a cursive style.

Richard S. Whitt
Senior Policy Counsel
MCI WorldCom

cc: Chairman William Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Larry Strickling, Chief, Common Carrier Bureau